In the Supreme Court

of the United States

OCTOBER TERM, 1975

No. 75-1058

MITSUI SHINTAKU GINKO K.K., TOKYO,
Petitioner,

v.

JOHN DODGE,
Respondent,

and

BRADY-HAMILTON STEVEDORE CO.,
Respondent.

BRIEF OF RESPONDENT BRADY-HAMILTON STEVEDORE CO. IN OPPOSITION TO THE PETITION OF MITSUI SHINTAKU GINKO K.K., TOKYO, FOR A WRIT OF CERTIORARI

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Respondent Brady-Hamilton Stevedore Co. (Brady-Hamilton) was served with Mitsui's Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit on January 21, 1976. Pursuant to Rule 24 of the Court, Brady-Hamilton respectfully submits its brief in opposition to Mitsui's petition.

OPINIONS BELOW

The opinion of the United States District Court for the District of Oregon was reported unofficially at 1975 A.M.C. 1505 (D. Or., 1974).

The opinion of the United States Court of Appeals for the Ninth Circuit has not yet been reported.

QUESTIONS PRESENTED

Brady-Hamilton accepts the statement of the first question presented by Mitsui. However, Brady-Hamilton believes that Mitsui's statement of the second question is misleading and suggests that the following states the issue more accurately:

Do the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., manifest congressional intent to overrule or limit prior decisions of this Court that deny negligent shipowners the right to seek contribution from concurrently negligent stevedore-employers in longshoremen's personal injury suits?

STATEMENT OF THE CASE

Mitsui's statement of the case is acceptable to this respondent.

ARGUMENT

Brady-Hamilton submits that Mitsui's petition should be denied, because the decision below does not conflict with a decision of any other circuit on the same matter and because the only question of federal law presented by Mitsui has been settled by this Court.

I

No Conflict Among the Circuits

Mitsui asserts that the decision below is in conflict with *Murray* v. *United States*, 405 F.2d 1361 (D.C. Cir., 1968). This is not correct. *Murray* involved consideration of the exclusive liability provision of the Federal Employees' Compensation Act (F.E.C.A.), 5 U.S.C. §§ 8101, 8116(c). A government employee was injured when an elevator fell in a building owned by Murray and leased to the United States. The government employee received benefits under F.E.C.A. and commenced a third-party action for negligence against Murray. Murray impleaded the United States, seeking contribution or indemnity. The District Court dismissed both of Murray's claims.

Paradoxically for Mitsui, the decision on which it relies *affirmed* the dismissals. With respect to contribution, the Court of Appeals cited with approval *American Mutual Liability Ins. Co.* v. *Matthews*, 182 F.2d 322, 1950 A.M.C. 1272 (2d Cir., 1950), a decision which held that § 5 (now § 5(a)) of the Longshoremen's Act is a defense by a stevedore-employer against a shipowner's claim for contribution. *Murray* further approved decisions applying *Matthews* both to cases under the District of Columbia Compensation Act (D.C. Code § 36-501 et seq.), which incorporates the Longshoremen's Act, and to cases under F.E.C.A. 405 F.2d, at 1364. The no-contribution rule of *Matthews* was adopted by this Court in *Halcyon Lines* v.

Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282, 1952 A.M.C. 1 (1952).

Mitsui is not concerned with the holdings in *Murray*, and with good reason, but rather with a dictum in that opinion. Having held that F.E.C.A. precluded Murray's action for contribution against the United States, the court said that any inequity residing in the denial of contribution was mitigated if not eliminated by the court's rule in *Martello* v. *Hawley*, 112 U.S. App. D.C. 129, 300 F.2d 721 (D.C. Cir., 1962), an automobile collision case that did not involve workmen's compensation. 405 F.2d, at 1365-66.

The *Murray* court's gratuitous extension of the *Martello* rule to a case involving workmen's compensation is dubious. The court must have reasoned that the United States, which paid its employee compensation pursuant to its absolute liability under F.E.C.A., was in effect a settling tortfeasor that bought its peace with its employee. By further analogy to *Martello*, Murray, the third party, would be entitled to a reduction by one-half of any judgment against him, even if the compensation benefits paid were less than half the amount of his judgment, because otherwise he would be unfairly disadvantaged by a "settlement" to which he was not a party and to which he did not consent. *Martello* v. *Hawley*, *supra*, 300 F.2d, at 724. The *Murray* court was apparently unaware of the decision of this Court in *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 1954 A.M.C. 1 (1953), which held that a shipowner's liability to an injured ship repairman may not be reduced by the amount of compensation payments

made to the injured workman by his employer pursuant to the Longshoremen's Act. The shipowner argued that the plaintiff, Hawn, would have a double recovery if he were allowed to keep his entire judgment, which included sums for lost wages and medical expenses, because the compensation paid by Hawn's employer, Haenn, was on account of lost wages and medical expenses. However, this Court noted that employers are permitted to recoup Longshoremen's Act compensation payments out of third-party recoveries. Acceptance of the shipowner's contention would frustrate one purpose of the Act, which is to protect employers, whom the Act subjects to absolute liability. "Moreover, reduction of Pope & Talbot's liability at the expense of Haenn would be the substantial equivalent of contribution which we declined to require in the *Halcyon* case." 346 U.S., at 412.

Pope & Talbot, Inc. v. *Hawn*, *supra*, makes it clear that there is no conceptual difference between reduction of a third party's liability to the extent of compensation payments made by an employer and reduction of a third party's liability by one-half, on account of compensation payments made by an employer: both credits amount to the same thing — contribution — which is contrary to the policy of the Longshoremen's Act. The decision below correctly recognized and applied the law.

It can hardly be said that *Murray* v. *United States*, *supra*, conflicts with the decision below when the only pertinent holding in *Murray*, on the issue of contribu-

tion, *supports* the decision below. Moreover, even if the precise holding in *Murray* is disregarded, F.E.C.A. exclusive liability cases have little precedential value in cases involving the Longshoremen's Act. See *White* v. *Texas Eastern Transmission Corp.*, 512 F.2d 486, 489-90 (5th Cir., 1975), cert. den. sub nom. *Bettis Corp.* v. *Charles Wheatley Co.*, 44 U.S.L.W. 3395, 3397 (Jan. 13, 1976). *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, *supra*, and *Pope & Talbot, Inc.* v. *Hawn*, *supra*, are as authoritative on the issues raised by Mitsui as any decisions can be, and their authority obviates any need to look for guidance to the conflicting decisions of lower federal courts in the F.E.C.A. cases.*

A review of the decisions of the Courts of Appeals that have interpreted § 5(b) of the amended Act reveals that there is no conflict among the circuits. The Second and Third Circuits, like the Ninth Circuit, have held that § 5(b) bars actions for contribution against stevedore-employers who have paid benefits pursuant to the Act. See *Landon* v. *Lief Hoegh & Co.*, 521 F.2d 756, 1975 A.M.C. 1106 (2d Cir., 1975), cert. den. sub nom. *A/S Arcadia* v. *Gulf Ins. Co.*, 44 U.S. L.W. 3395, 3398 (Jan. 13, 1976); *Griffith* v. *Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31, 44 (3d Cir., 1975), cert. den. 44 U.S.L.W. 3395, 3398 (Jan. 13, 1976).

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* The authorities are listed in *Galimi* v. *Jetco, Inc.*, 514 F.2d 949, 953, 1975 A.M.C. 681 (2d Cir., 1975), which holds that FECA bars actions against the United States for contribution or indemnity.

II

No Unsettled Question of Federal Law

Brady-Hamilton has already discussed *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, *supra*, and *Pope & Talbot, Inc.* v. *Hawn*, *supra*. *Halcyon* holds that the Longshoremen's Act does not permit a shipowner to seek contribution from a stevedore-employer who has provided benefits pursuant to the Act and that it is for Congress, not this Court, to create new rules of contribution in the law of maritime personal injuries. *Hawn* holds that a shipowner is not entitled to a credit against his judgment liability in the amount of compensation benefits furnished an injured workman by his employer pursuant to the Act, because such a credit would be the substantial equivalent of contribution. The Ninth Circuit correctly recognized both decisions as controlling on the issues raised by Mitsui.

The opinion of this Court in *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106, 1974 A.M.C. 537 (1974), reaffirms the validity of *Halcyon*. There, the trial court found that Cooper, the loading stevedore in Houston, Texas, was concurrently negligent with the shipowner and that both were liable to Sessions, a longshoreman employee of the discharging stevedore in New Orleans, Louisiana, for injuries caused by their negligent stowage of cargo. Cooper contended that the shipowner's successful action for contribution against it was contrary to the *Halcyon* decision. This Court rejected that contention, holding

that *Halcyon* continues to bar contribution actions against employers who are statutorily immunized from tort liability to their employees by reason of their liability for compensation under the Act. The opinion distinguished *Halcyon* as follows:

> . . . Unlike the injured worker in *Halcyon*, Sessions was not an employee of Cooper and could have proceeded against either the Vessel or Cooper or both of them to recover full damages for his injury. Had Sessions done so, either or both of the defendants could have been held responsible for all or part of the damages. Since Sessions could have elected to make Cooper bear its share of the damages caused by its negligence, we see no reason why the Vessel should not be accorded the same right. . . . 47 U.S., at 113.

This Court emphasized that *Halcyon* "was, and still is, good law on its facts." *Id.*, at 115.

The facts of *Halcyon* are also the facts of this case —Brady-Hamilton paid compensation benefits to respondent John Dodge, its employee, and having done so is immunized by statute from any liability to Mitsui.

It would indeed be an irony if the congressional overruling of *Ryan Stevedoring Co.* v. *Pan-Atlantic SS Corp.*, 350 U.S. 124, 1956 A.M.C. 9 (1956), which recognized a right of indemnity against stevedore-employers, should be construed as a restoration *sub silentio* of shipowners' rights to contribution that were denied in *Halcyon* and *Hawn*. In fact, the congressional committees expressed themselves plainly on this subject; the discussion is as follows:

> Under the proposed amendments the vessel may not by contractual agreement *or otherwise* require the employer to indemnify it, in whole *or in part*, for such damages [i.e., third-party liability to harbor workers]. S. Rep. No. 92-1125, 92d Cong., 2d Sess., 10 (1972) (Emphasis added).

The conclusion is compelling that the questions settled long ago by *Halcyon* and *Hawn* have not been reopened by the 1972 amendments to the Longshoremen's Act.

CONCLUSION

For the foregoing reasons, Mitsui's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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February 13, 1976.